

March 21, 2000

International Trade Administration,
Department of Commerce;
Secretary, Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

**ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER
TRANSACTIONS IN THE BORDERLESS ONLINE MARKETPLACE**

REQUEST FOR PANEL PARTICIPATION/COMMENTS

Introduction

The Better Business Bureau® Serving Metropolitan New York (BBB) is a unique not-for-profit organization serving all five boroughs of New York City and, through its sister offices, the Long Island, N.Y. and Mid-Hudson, N.Y. regions. As you may know, one of the central, longstanding functions of the BBB has been to provide skilled, accessible dispute resolution services to the local consumer-business community. Such services encompass conciliation, mediation, and arbitration. Recognizing the new avenues for conflict resolution now available in our on-line world, the BBB believes it's the right time to expand our dispute resolution system into the electronic marketplace.

As such, the BBB is particularly interested in participating in the above captioned workshop. Indeed, given our particular expertise in the area of consumer-business dispute resolution, the sheer volume of disputes that we handle in any given year, and our goal of developing a viable and effective on-line DR mechanism, we feel that our participation in such a global dialogue will provide practical insight from a truly unique perspective.

Consumer-Business Dispute Resolution Programs: Infrastructure

A key ingredient in any forum for effective dispute resolution has always been, remains, and shall continue to be an inherent trust and confidence *in the process itself* - and, by logical

extension, the administration of that process - by all parties involved. Any effective and utilitarian on-line DR program must retain and promote such confidence in both the consumer and the business. In addition to neutrality issues, this specifically encompasses privacy and confidentiality concerns, an ever-growing source of contention in the electronic marketplace. Given the BBB's long established reputation for neutrality and name recognition, we should be able to transfer our ADR services and programs on-line without losing the confidence of our more traditional user base. Indeed, the methodology may change, but the forum remains the same.

BBB Mediation: Non-Traditional; Effective

The BBB has long been conducting its mediation services in a *non-traditional format*, settling disputes via telephone/mail. Indeed, without conducting traditional face-to-face mediation (for myriad reasons, from sheer volume to personnel and time limitations), the BBB has already demonstrated the attainable success of non-traditional mediation. Performed correctly, telephone mediation has proven quite effective, extremely efficient, and appropriate for a broad range of cases. Analogously, on-line mediation – performed correctly – should be able to achieve such measured success *in a further expedited fashion*.

The duration of the standard Bureau mediation process is generally six to eight weeks (dependent upon case specific circumstances). The Bureau receives pre-mediation complaints through a variety of methods: (1) via the return of a completed BBB complaint form; (2) through a mailed or faxed consumer complaint letter; (3) through the Bureau's consumer phone lines; or (4) through the Internet.

Upon receipt of a consumer complaint, the Bureau makes an initial determination as to the dispute's eligibility for BBB mediation (as with arbitration, certain disputes fall outside of the Bureau's purview). Upon determination that the claim does fall within the Bureau's purview, a BBB mediator is assigned to the case. The mediator enters the pertinent information into the Bureau's computer system, which automatically generates a complaint letter to the business about which has been complained. Said business is generally permitted about fifteen (15) business days to research and respond to the complaint. Should the business initially fail to respond, the mediator will follow up via telephone.

If the business does heed the Bureau's mediation efforts, its response may generally be categorized in one of three ways: (1) agreement with the consumer's position, with a corresponding offer of full settlement; (2) an offer of partial settlement; or (3) a dispute with the consumer's claim. Should settlement not be achieved at this stage, a conference call with the consumer, an *authorized* business representative (i.e., possessing settlement authority), and the Bureau mediator may prove quite effective.

As with "in-person" mediation, the *mediation conference call offers the traditional advantages of direct party-to-party dialogue, enhanced communication, and potentially prompt clarification of any unknown, contradictory, or previously ambiguous positions*. Moreover, the skilled Bureau mediator is accorded the opportunity to reflect back each party's position to the

other, to help diffuse pent-up emotions, and to identify any areas of agreement (while distilling areas of true disagreement). *This is perhaps the most potentially problematic element of the on-line DR process.*

Any pragmatic on-line DR program *must recognize the unique nature of the consumer-business dispute resolution framework.* Indeed, specific to the consumer-business setting is the potential for hardened positions, damaged egos, and overt hostility based upon initially simple misunderstandings and a concomitant failure to communicate. This is certainly not to suggest that the prototypical consumer complaint is a mere overreaction to a minor infraction, nor to suggest that ineffective or inappropriate business complaint handling routinely escalates otherwise minor disputes. Indeed, there are unscrupulous businesses that do prey upon the unsuspecting, less savvy consumer (sometimes committing grievous violations of good business practice and, in some cases, the law). Similarly, certain consumers do seek to take markedly unfair advantage of a company's goodwill and generosity toward its customers. Hence, *a key function of the skilled consumer-business dispute mediator is to distinguish the former dispute from the latter and mediate accordingly.*

For example, when a mediator discerns that an emotional, antagonistic dispute essentially derives from a relatively minor disagreement (e.g., regarding store policy interpretation), he/she may appropriately seek to re-focus the parties on the true issue at hand. Perhaps the consumer simply failed to carefully read the store's posted return policy or the store utilized seemingly ambiguous terminology. Such a scenario may have metamorphosed in the following (arguably typical) manner: (1) an inappropriately phrased complaint coupled with an abrupt or apathetic reply; (2) mutually disparaging remarks in response; (3) a corresponding loss of focus upon the dispositive facts of the dispute (4) several days (or possibly weeks) of angry phone calls and/or correspondence demanding "satisfaction" for a perceived wrong; (5) increasingly hostile rebukes; (6) vacuous threats of forthcoming legal action; and (7) the eventual presentation of the resultantly intensified, hostile dispute to the BBB.

By reflecting opposing viewpoints and collaterally distilling the parties' true factual positions (and, by extension, the simplistic origin of the dispute), the mediator for such a dispute may effectively remove grandstanding, blame assignment and rancor from the equation. Frequently, the parties to a consumer-business mediation are simply so angry with one another that they fail to recognize a simple and otherwise obvious mutually acceptable resolution to their dispute. Indeed, a quick resolution which, at the time of initial disagreement, may have been offered and accepted but for a few hastily spewed barbs, may be recaptured.

An inexperienced or less skilled mediator may approach such a dispute "in its *present* form." At first blush, such a statement appears curiously backward. Indeed, how else would one approach such a controversy? Disputes of this ilk, however, are not in their *appropriate* form; they have artificially transformed into something much less susceptible to effective resolution. Should a Bureau mediator "get caught in the net of emotion" and blame assignment surrounding the controversy and *all* of their attendant issues, he/she may inadvertently focus his/her mediation efforts on *peripheral*, non-dispositive issues without ascertaining (or resolving) the root cause of the dispute in the minds of the parties.

Clearly, effective mediation (whether in-person, telephone, or electronic) entails a *careful balancing act between emotive management, fact finding, issue spotting, and communication enhancement*. An appropriate level of party venting can be a necessary and valuable step in the resolution process, but the effective mediator should never allow emotion to dominate or dictate the process.

While an initially simple issue can, of course, generate subsequent legitimate - and potentially more serious and complex - issues, the recognition and subsequent resolution of such is still generally dependent upon piercing the veil of hostility, distilling the facts of the *underlying* dispute, and uncovering associated areas of common ground and understanding. Neither party will generally accept the legitimacy of their counterpart's *secondary* points of contention without, at the very least, understanding the true basis of the *core* dispute.

Hence, in disputes where relatively minor disagreements have escalated into full-blown wars of words and unnecessarily hardened positions, the above referenced technique of initially diffusing heightened emotions while collaterally re-focusing the parties on the easily resolvable nature of the underlying core dispute will, at the very least, engender greatly enhanced communication and may frequently foster prompt, mutually satisfactory settlement.

The aforementioned *must be taken into account in the establishment of any practical ADR program in the electronic format. Without such, the essence and effectiveness of consumer-business dispute resolution is necessarily largely lost.*

On-line Advantages

While there are certain manifest advantages to in-person, traditional mediation, on-line mediation does offer some distinct *advantages* of its own:

(1) Expedience, offering parties the opportunity for highly efficient dispute resolution, regardless of geographic distance.

(2) Convenience for the parties, some of whom might forego the dispute resolution process altogether if perceived to require "excessive" effort (e.g., the prospect of ceding part of a business day to prepare for, travel to, and attend an in-person mediation);

(3) A potentially more "even playing field" for disparately situated parties (as may be the case in consumer-business disputes);

(4) Practical negation of the physical intimidation factor (even if subtle, such tactics necessarily undermine the core integrity and utility of the mediation process);

(5) Ease of caucusing (the potential option of immediate, private party caucusing, via the click of a mouse, not only expedites the entire process generally, but offers the parties a readily available, confidential "comfort zone"); and

(6) The ability to call immediate breaks, where necessary, to stem excessive party venting (even if only "electronic venting") or permit additional party information/document gathering and resume the mediation without unduly inconveniencing the parties; a mediator may be far more loath to reschedule an *in-person* mediation under comparable circumstances (perhaps - even somewhat subconsciously - requiring a higher threshold for perceived practical purposes).

It is these manifest advantages that should be the central focus of the BBB (and other pragmatic) dispute resolution program(s) instituted in the electronic marketplace. It is merely a question of minimizing the inherent and unavoidable shortcomings of the format, while maximizing the true advantages.

Conclusory Remarks

While we have shared some of our comments herein, the BBB seeks to join the dialogue in a truly meaningful fashion. Accordingly, we respectfully request inclusion in your upcoming workshop and look forward to participating. I would hope to attend myself. However, if you choose a date when I am unavailable, then I would ask that Brian D. Rauer, Director, Mediation and Arbitration, of the Better Business Bureau Serving Metro N.Y., participate.

Very truly yours,

Ronna D. Brown, President, The Better Business Bureau Serving Metropolitan N.Y.

BIOGRAPHIES

Ronna D. Brown is the President of the Better Business Bureau Serving Metropolitan New York. She guides all program development, administration, fundraising and marketing activities. Under her leadership, the Metropolitan New York BBB has been given the national award as the best large market BBB in both 1998 and 1999. She was previously Vice President and General Counsel of the Metro New York BBB. Prior to her tenure at the BBB, Ms. Brown was Deputy Bureau Chief of the Consumer Frauds and Protection Bureau of the New York State Attorney General's Office. She is a past Chair of the Committee on Consumer Affairs at the Association of the Bar of the City of New York. Ms. Brown is a graduate of the University of California at Berkeley and New York University Law School.

Brian D. Rauer is the Director, Mediation and Arbitration, of the Better Business Bureau® Serving Metropolitan N.Y., Inc. Mr. Rauer is also Counsel. His responsibilities (among others) have included: direct oversight of BBB arbitration, mediation, and dispute resolution programs; supervision and training of BBB mediators and arbitrators; policy promulgation and enforcement; daily legal operations; contract drafting and negotiation; personnel evaluation; lecturing/P.R. speaking; and media interviews. Earlier experience includes the Manhattan based law firm of Plunkett & Jaffe, P.C. and the Supreme Court of N.Y., Ninth Judicial Dist., Westchester County Courthouse (Law Dep't). While not an active arbitrator, Mr. Rauer was previously certified as a member of the National and State Panels of Consumer Arbitrators (Council of BBBs). Mr. Rauer has been published twice in the *World Arbitration and Mediation Report*. Mr. Rauer was also an invited speaker/faculty at the First Annual Conference of the ABA Section of Dispute Resolution (1999). A graduate of Tulane Law School, Mr. Rauer was awarded the Dean's Medal, honored with two Corpus Juris Secundum Awards, two American Jurisprudence Prize Awards, the Edwin I. Mahoney Award, and selected for membership in the Order of the Coif. While at Tulane, Mr. Rauer maintained a position as Managing Editor of the Tulane Environmental Law Journal. Mr. Rauer earned his Bachelor of Science degree, Summa Cum Laude, in Business Administration.